

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)
)
 v.) 1:12-cr-00160-JAW
)
MALCOLM A. FRENCH, et al.)

**ORDER ON DEFENDANT MALCOLM A. FRENCH'S MOTION FOR
TEMPORARY RELEASE AND FOR ORDER AUTHORIZING TRANSPORT
BY AGREEMENT OR IN THE ALTERNATIVE BY THE UNITED STATES
MARSHALS SERVICE**

A defendant incarcerated while awaiting sentencing moves the Court to order his temporary release to visit his ill father. Concluding that the Defendant has not clearly demonstrated exceptional circumstances under 18 U.S.C. § 3145(c) and that the Defendant has failed to demonstrate by clear and convincing evidence that he is not likely to flee or pose a danger under 18 U.S.C. § 3143(a)(1) and (b)(1), the Court declines to release him.

I. BACKGROUND

A. Charges, Convictions, and Sentencing

On September 14, 2012, a federal grand jury indicted Malcolm A. French and others for a series of federal crimes relating to their alleged involvement with a marijuana growing operation in Maine. *Indictment* (ECF No. 2). On November 13, 2013, a grand jury issued a superseding indictment. *Superseding Indictment* (ECF No. 187). On January 24, 2014, at the close of a jury trial that lasted from January 8, 2014 through January 24, 2014, the jury returned verdicts finding Mr. French guilty of engaging in a conspiracy to manufacture marijuana, of manufacturing

marijuana, of managing or controlling a drug-involved premises, of harboring illegal aliens, and of engaging in a conspiracy to distribute marijuana. *Jury Verdict Form* (ECF No. 311). As a conviction for some of these crimes requires immediate detention, the Court ordered Mr. French detained following the verdict.

Mr. French's sentencing has been delayed by the Defendants filing a number of post-verdict motions. The Court has now resolved each of these motions and the case is in order for sentencing. The Court scheduled a presentence conference with counsel for June 8, 2015 and anticipates fixing a sentencing hearing date at the presentence conference. While awaiting sentencing, Mr. French is being held at the Piscataquis County Jail in Dover-Foxcroft, Maine and as the state of Maine has no federal correctional facilities, after sentencing, the Bureau of Prisons (BOP) will assign him to a federal correctional institution somewhere outside of Maine.

B. Malcolm French's May 1, 2015 Motion

On May 1, 2015, Mr. French filed a motion for temporary release, asking that he be allowed to leave prison to visit his eighty-one year old father. *Def.'s Mot. for Temp. Release and Order Authorizing Transp. by Agreement or in the Alt. by the US Marshal[s] Serv.* (ECF No. 505) (*Def.'s Mot.*). Mr. French represented that his father, Forest French, was hospitalized at the Eastern Maine Medical Center in Bangor, Maine and that his father was nearing the end of his life. *Id.* at 1. Mr. French wished to see his father before he passed away. *Id.* Mr. French subsequently provided the Court with copies of his father's medical records that confirm the dire nature of his father's medical condition. *Mot. to File Med. Records of Forest French Under Seal*

Attach. 1 (ECF No. 508) (*Med. Records of Forest French*). Subsequently, Mr. French's counsel indicated that Forest French has been moved to hospice care in Howland, Maine.

C. The Government's May 4, 2015 Objection

On May 4, 2015, the Government objected to any temporary release. *Gov't's Objection to the Def.'s Mot. for Temp. Release* (ECF No. 506). The bases of the Government's objection were that Mr. French presents a risk of flight, that he attempted to commit suicide while on pretrial bail, and that the United States Marshals Service (USMS) objected to transporting Mr. French outside of jail, viewing such a transport as high risk. *Id.* at 1-4.

D. The May 5, 2015 Conference of Counsel

On May 5, 2015, the Court held a conference of counsel to discuss Mr. French's request. *Minute Entry* (ECF No. 511). A representative of the USMS and the Probation Office were present at the Court's request. At the conference, the Court observed that the Presentence Investigation Report in his case had set the Guideline sentence range at 235 to 293 months and that he faced a statutory minimum sentence of 120 months. *Presentence Investigation Report* at 24 (PSR). The Court also noted that upon sentencing, it would be highly unlikely that the BOP would release Mr. French for such a visit and, assuming that the sentencing will take place as early as late June, the window for Mr. French's release is extremely narrow.

After reviewing the underlying circumstances of this case, the Court indicated that it would not order the USMS over its objection to transport Mr. French. The

Court noted that the USMS presented manpower issues with making such a transport, and that the Court had concerns about Mr. French's potential flight, especially in view of the length of time of potential incarceration and in view of evidence that Mr. French had been involved in spiriting illegal Mexican workers out of the country.

The Court suggested that defense counsel speak with the USMS to see if he could gain the USMS's acquiescence. The Court further indicated that it would be reluctant to release Mr. French to any person who did not have arrest authority and suggested that another alternative might be to release Mr. French to the custody of the state police or county sheriff and the Court urged defense counsel to discuss this potential alternative with the USMS.

Finally, failing that, the Court suggested that Mr. French might be able to use a videoconference to communicate with his father, using Skype, Facetime or some other similar service. Although not as personal as actually being at his father's bedside, the Court noted that the use of such videoconferencing would allow Mr. French and his father to talk to and see each other. The Court allowed defense counsel time to explore these alternatives.

E. The May 13, 2015 Follow-up

On May 13, 2015, Attorney Walter McKee, Mr. French's attorney, contacted the Clerk's Office to confirm that he was unable to obtain the USMS's acquiescence to any of the transportation alternatives, including transportation by the sheriff. He also relayed that given Forest French's condition, a videoconference is not an option.

Rather than withdrawing the motion, however, Mr. French asked that the Court issue a ruling.

II. DISCUSSION

A. Legal Standards

Under 18 U.S.C. § 3143(a), Malcolm French is subject to mandatory detention pending the imposition of sentence because he was convicted of “an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act.” *See also* 18 U.S.C. § 3142. Mr. French faces a mandatory minimum term of incarceration of ten years and a maximum term of life for his convictions for engaging in a conspiracy to manufacture 1,000 or more marijuana plants and for manufacturing 1,000 or more marijuana plants. 21 U.S.C. § 841(b)(1)(A).

There is a statutory provision that allows a court to release a defendant after conviction but before the imposition of sentence:

A person subject to detention pursuant to § 3143(a)(2) or (b)(2), and who meets the conditions of release set forth in § 3143(a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.

18 U.S.C. § 3145(c). Based on *United States v. Weiner*, No. 92-1708, 1992 U.S. App. LEXIS 28794 (1st Cir. July 31, 1992), the Court assumes that it has the authority under § 3145(c) to order Mr. French’s temporary release. To qualify for release, a defendant must first meet the “conditions of release set forth in § 3143(a)(1) or (b)(1).” 18 U.S.C. § 3145(c). Each provision mandates that the defendant demonstrate by clear and convincing evidence “that the person is not likely to flee or pose a danger to

the safety of any other person or the community if released.” *Id.* § 3143(a)(1), (b)(1). Even if a defendant satisfies these criteria, he must still “clearly show[] that there are exceptional reasons why such person’s detention would not be appropriate.” *Id.* § 3145(c).

B. Not Likely to Flee or Pose a Danger

Several factors militate against Mr. French’s motion. First, the seriousness of and potential penalties for the crimes of which he has been convicted caution against temporary release. Mr. French must spend at least ten years in prison and the Guideline sentence range begins at nearly twenty years and caps at over twenty-four years. The length of the potential prison term is itself an incentive to flee. *See United States v. Boulter*, No. 1:13-cr-00132-JAW, 2014 U.S. Dist. LEXIS 143826 (D. Me. Oct. 9, 2014) (denying temporary release to attend father’s funeral where defendant faced a prison term of 120 months); *United States v. Cameron*, Nos. 1:09-cr-00024-JAW, 1:13-cr-00001-JAW (defendant initially sentenced to 192 months of imprisonment fled after being released pending appeal).

Second, Mr. French attempted suicide while on pretrial release. PSR ¶¶ 4, 74. A suicide attempt may be a factor in determining either whether a defendant poses a danger to himself¹ or presents a risk of non-appearance under § 3143(a)(2)(B). *United*

¹ There is some controversy as to whether the risk of attempted suicide may be properly considered under 18 U.S.C. § 3142(c)(1)(xiv), which addresses pretrial release and which requires a court to consider whether the release of a defendant poses “a danger to any other person and the community.” *See United States v. Metz*, No. 12-M-01193-JJM, 2012 U.S. Dist. LEXIS 183442, at *6-8 (W.D.N.Y. Dec. 12, 2012) (concluding that the phrase “any other person” does not include the defendant). But the language of § 3142(g)(4), which addresses the factors to be considered in determining whether there are conditions of release that will reasonably assure the defendant’s appearance and the safety of any other person and the community, uses slightly different language: “the nature and seriousness of the danger to *any person* or the community that would be posed by the

States v. Knight, No. 3:12-cr-21-J-32-MCR, 2012 U.S. Dist. LEXIS 116840, at *3-5 (D.N.H. Aug. 14, 2012). Although the typical defendant presents a certain risk of attempted flight if released, Mr. French's attempted suicide presents a risk in addition to that of the typical defendant. *United States v. Krueger*, No. 13-20242, 2013 U.S. Dist. LEXIS 96053, at *6-7 (E.D. Mich. July 10, 2013); *United States v. Wasendorf*, No. CR12-2021, 2012 U.S. Dist. LEXIS 130910, at *20-22 (N.D. Iowa Sept. 13, 2012). Mr. French presented no evidence of his current mental health and therefore failed to sustain his burden on this issue.

Third, Mr. French has substantial assets. The PSR indicates that he enjoys a net worth in excess of \$14,000,000. PSR ¶ 84. Courts have considered the financial status of the defendant in determining whether it is likely that he will fail to appear as required. *See, e.g., Wasendorf*, 2012 U.S. Dist. LEXIS 130910, at *23.

Fourth, the PSR recommends that Mr. French receive an obstruction of justice enhancement for providing false testimony at trial. PSR ¶ 32. Mr. French argues that his decision not to plead guilty and go to trial should not be held against him. *Def.'s Mot.* at 3. The Court agrees with Mr. French as far as he goes. But the Court has considered that the Probation Office determined he obstructed justice at trial as evidence of his lack of respect for law and his unwillingness to abide by basic rules applicable to others.

person's release." 18 U.S.C. § 3142(g)(4) (emphasis added). This language has been interpreted to include the defendant and his potential suicide. *United States v. Krueger*, No. 13-20242, 2013 U.S. Dist. LEXIS 96053, at *6-7 (E.D. Mich. July 10, 2013). In any event, the Court may consider "the potential of the Defendant committing suicide in the context of assessing his possibility of non-appearance." *Id.*

Fifth, although not convicted of aiding and abetting escape of the illegal workers, the evidence established that Mr. French was in fact involved in arranging for the overnight sequestering of illegal aliens after the law enforcement raid and the aliens' disappearance from the state of Maine. If Mr. French could arrange for the successful flight of some of his workers, he has not demonstrated that he could not arrange for his own flight.

Sixth, the Court has considered the objections of the USMS. Under the statute, the USMS is charged with providing "for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution." 18 U.S.C. § 4086. The Court has therefore considered the USMS's opposition to the temporary release of Mr. French, not only to an order to release him to the USMS, but also to an order to release him to the custody of a state law enforcement officer with arrest power. *See United States v. Kenney*, No. CR-07-66-B-W, 2009 U.S. Dist. LEXIS 121233, at *9 (D. Me. Dec. 30, 2009) ("The Court finds no basis to order the United States Marshal to transport Ms. Kenney around the state of Maine to attend the wake and funeral and DENIES her motion for a transport order").

Not all factors favor denial of Mr. French's motion. Mr. French's request concerns a visit to his father, not a remote relative or friend. *Id.* at *7 (considering that the request was to attend the funeral of the defendant's grandmother, "not a more remote relative or friend"). Furthermore, having reviewed Forest French's medical records, the Court concludes that unfortunately Mr. French's father is indeed

very ill. The facts about Mr. French's father's health that underlie Mr. French's request for release are not factitious; they are real. Also, Mr. French has no criminal history and no history of his own flight or escape, notwithstanding his suicide attempt. *See Boulter*, 2014 U.S. Dist. LEXIS 143826, at *7 (denying temporary release to a defendant with a history of convictions for escape, failure to appear and violating conditions of release). Forest French is apparently living at a skilled nursing facility in Howland, Maine, about a seventy-mile round trip across rural Maine roads from Dover-Foxcroft, Maine, where Mr. French is currently incarcerated. The anticipated route therefore would not bring Mr. French through a more major city and not near any state line or national boundary. *See id.* at *7-8 (denying temporary release to a defendant whose father's funeral was scheduled to take place approximately four hours from the jail and the site of the funeral was near the Canadian border).

Nevertheless, the burden is on Mr. French to clearly demonstrate that his release is for an exceptional reason and to prove by clear and convincing evidence that he is not likely to flee or pose a danger. The Court concludes that Mr. French has failed to meet this burden. Furthermore, in the context of the death of a family member, the Court elsewhere has noted that "the death of a family member, even a close family member, does not necessarily cross the threshold from common to exceptional. The death of close family members, though infrequent, is after all inevitable." *Kenney*, 2009 U.S. Dist. LEXIS 121233, at *7. Absent the acquiescence of the USMS, the Court does not find that Mr. French has met his burden of clearly

demonstrating the exceptional circumstances that are required before this Court may order his temporary release. The Court appreciates Mr. French's desire to physically see and speak with his father and it regrets having to reject Mr. French's request.

As a postscript, at the May 5, 2015 conference the USMS indicated a willingness to accommodate Mr. French if he wished to communicate with his father by videoconference, either by Skype or Facetime; however, defense counsel informed the Clerk's Office that his father's condition rendered this possibility impractical. If his father improves to the point where such a videoconference may take place, the Court urges defense counsel to work with the USMS and the Piscataquis County Sheriff's Office to allow for a virtual visit. Though not the same as being there, a videoconference is the next best thing.

III. CONCLUSION

The Court DENIES Defendant's Motion for Temporary Release and Order Authorizing Transport by Agreement or in the Alternative by the US Marshal's Service (ECF No. 505).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 19th day of May, 2015

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